

The Board of Appeals administers a voluntary disclosure program that can provide for limited liabilities for participants who come forward and disclose their liabilities. See 86 Ill. Adm. Code 210.126. (This is a GIL.)

August 10, 2006

Dear Xxxxx:

This letter is in response to your letter dated March 31, 2006, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

We have been retained by a corporate client ("Corporation") to negotiate, on an anonymous basis, the possible registration of Corporation in Illinois for sales and use tax purposes.

Corporation is a seller of tangible and intangible personal property, as well as certain services, to customers located throughout the United States. Corporation, which is neither incorporated nor has a sales location in Illinois, uses common carriers to deliver its products to its customers in Illinois. Corporation does not own or lease any property in Illinois, nor does it have any sales representatives that reside in Illinois. Its sales representatives from outside the state make only infrequent one-day trips to Illinois approximately four times per year for purposes of soliciting sales.

Corporation has not registered for sales and use tax purposes in Illinois, nor has it collected use taxes on any of its sales to customers located in Illinois. Corporation has recently conducted an analysis of its sales to Illinois customers. Based on that analysis, Corporation has concluded that in excess of 85% of those sales either are exempt from Illinois sales and use taxes or were made to customers that self-assess and remit such taxes. In either case, no tax would be due from Corporation with respect to such sales even if Corporation were registered in Illinois.

Corporation has not been contacted by Illinois and is not under audit or inquiry by Illinois. The stock of Corporation was recently acquired by another corporation and, in connection with such acquisition, Corporation was asked to investigate whether substantial nexus exists to require Corporation's registration for sales and use taxes in Illinois. Because of the infrequent nature of Corporation's contacts with Illinois, we have advised Corporation that we believe it is not required to register for sales and use tax purposes. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992).

However, we have also advised Corporation that it is possible that Illinois may audit Corporation and take the position that Corporation does have substantial nexus and should have collected use taxes on its sales of tangible personal property to customers located in Illinois. Given this possibility, Corporation has informed us that, pursuant to the Illinois Department of Revenue's Voluntary Disclosure Program, it would be willing to voluntarily register for sales and use tax purposes in Illinois and collect any use tax on a prospective basis, if Illinois would agree not to assess taxes, penalties or interest for any prior periods. However, if Illinois is unwilling to enter into a prospective registration agreement, then Corporation will respond by severing its *de minimis* contacts with Illinois, thereby virtually eliminating any risk of continued exposure. Because these contacts are very limited, such a response could be easily implemented by Corporation without significant business effect.

Considering that Corporation would prefer to keep its contacts in Illinois if possible, and Illinois obviously has an interest in receiving use taxes on Corporation's sales to its Illinois customers, we believe it would be to the mutual benefit of both Illinois and Corporation to enter into a prospective use tax registration agreement.

Please let us know whether Illinois would be willing to waive any past use tax liability, interest and penalties with regard to any use taxes or returns of Corporation for prior periods in exchange for an agreement that Corporation will register for sales and use tax purposes and begin to collect and remit all such taxes due to Illinois for all future periods. If so, please also let us know how to proceed with a closing agreement incorporating the above terms and the prospective registration process.

Thank you very much for your time and assistance.

DEPARTMENT'S RESPONSE

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your client would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations.

Whether a retailer is subject to Illinois Retailers' Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer has sufficient "nexus" with the State of Illinois so that the retailer will be subject to Illinois law. The following information outlines the principles of nexus.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then

liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Zehnder*, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and the customer must remit the amount directly to the State. The Use Tax rate is 6.25%

In general, the imposition of the various local sales taxes in Illinois takes effect when "selling" occurs in a jurisdiction imposing a tax. The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred. See 86 Ill. Adm. Code 270.115(b), enclosed. The tax rate is fixed by the location of the seller, not the delivery location. The fact that the item being sold is shipped from out-of-State or from another Illinois location is immaterial for purposes of local taxes if the sale occurs through order acceptance in an Illinois jurisdiction imposing a local tax. For these transactions the local tax will be incurred.

If a purchase order is accepted outside the State, but the property being sold is located in an inventory of the retailer which is located in an Illinois jurisdiction that has imposed a local tax (see, for example, Section 270.115(b)(3)), then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes. In situations in which the retailer has nexus, but both the purchase order acceptance and the location of the property being purchased are outside of the State of Illinois, such sales would only be subject to the Illinois Use Tax at the rate of 6.25%.

Although the regulation cited above (86 Ill. Adm. Code 270.115) deals with the municipal home rule taxes, the principles outlined in this regulation apply to all local taxes administered by the Department.

The Board of Appeals administers a voluntary disclosure program that can provide for limited liabilities for participants who come forward and disclose their liabilities. Please see the Department's regulation regarding voluntary disclosure at 86 Ill. Adm. Code 210.126 for information about the program. The Department's form BOA-2, "Application for Voluntary Disclosure" is available on the Department's website.

If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote
Associate Counsel

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